UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

Constellium Rolled Products
Ravenswood, LLC

Respondent,

and

Case 09-CA-116410

United Steel, Paper and Forestry,
Rubber, Manufacturing, Energy,
Allied Industrial and Service
Workers International Union,
Local 5668

Charging Party.

Charging Party's Statement of Position

Nathan Kilbert, Assistant General Counsel
Zachary Hebert, Assistant General Counsel
United Steelworkers
60 Boulevard of the Allies, Suite 807
Pittsburgh, Pennsylvania 15222

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Regulations

Other Authorities

INTRODUCTION

In response to the notice issued by the National Labor Relations Board ("the Board") on March 10, 2020, the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local 5668 ("the Charging Party" or "the Union") submits this position statement on remand of the Board's decision in *Constellium Rolled Products Ravenswood, LLC*, 366 NLRB No. 131 (2018) ("*Constellium*").

In *Constellium*, the Board found that the Respondent unlawfully disciplined its employee, Andrew "Jack" Williams, because Mr. Williams engaged in protected activity under the National Labor Relations Act ("the Act"). In reaching this decision, the Board found that Mr. Williams did not lose protection of the Act even though his outburst in protest of the Respondent's change in a term and condition of employment contained vulgar or offensive language. Lastly, the Board rejected the Respondent's argument that it should have been permitted to discipline Mr. Williams because his outburst defaced company property.

This case now returns to the Board on remand from the United States Court of Appeals for the District of Columbia to address the sole remaining issue of whether there is any conflict between the Board's decision in *Constellium* and the Respondent's obligations under other employment laws. *Constellium Rolled Products Ravenswood, LLC v. NLRB*, 945 F.3d 546, 552 (D.C. Cir. 2019).

For the reasons described below, the Board should affirm its earlier decision in *Constellium* and find that there is no conflict – real or potential – between its decision and the Respondent's obligations under other employment laws.

STATEMENT OF FACTS

The relevant facts are accurately described in the Board's decision in *Constellium*. See, 366 NLRB at 1-2. Those facts are summarized here below.

For many years, the Charging Party has represented employees at the Respondent's facility in Ravenswood, West Virginia. From 2006 through 2010, the parties benefitted from a collective-bargaining agreement. The parties continued negotiations for a successor contract through expiration on May 31, 2010, but were unable to reach agreement for several years.

The parties had previously negotiated a procedure for the Respondent to select employees for the performance of overtime work. With this, employees would be asked to work overtime shifts when available, and would not be subject to discipline if they failed to work the shift after volunteering. This negotiated procedure had been included in the expired collective bargaining agreement.

Around April 15, 2013 – before the parties had reached a successor bargaining agreement and while they were obligated to maintain the post-expiration status quo – the Respondent unilaterally declared impasse and changed the bargained-for overtime policy. Under this new iteration of the overtime policy, employees were required to sign-up for available overtime shifts on sheet posted on the lunchroom bulletin board seven days in advance. Importantly, as well, employees now faced discipline under the Respondent's attendance policy if they did not work the overtime shift. The overtime sign-up sheets were posted weekly and removed every Thursday.

The Respondent's unilateral implementation of this overtime policy was met with opposition from the Charging Party and employees. These protests included: the Charging Party filing an unfair labor practice charge, over 50 employees filing grievances, and some employees boycotting the new procedure and refusing to sign up for overtime shifts. In addition, the sign-

up sheets garnered a new name: "the whore board." This new moniker was adopted and used not only by employees, but also by supervisors. (Tra. At 73; 87; 114). No one was disciplined for using this phrase verbally. In fact, the Board correctly found that the Respondent had displayed "a general laxity toward profane and vulgar language in the workplace." *Constellium,* 366 NLRB at 2.

Mr. Williams quickly joined in this protest and boycotted the overtime procedure. At the end of his shift on Wednesday, October 2, 2013 – the day before the sign-up sheet was to be removed – Mr. Williams wrote "whore board" on top of the sheet of paper. Mr. Williams admitted to writing this message, and the Respondent suspended him with the intent to discharge. That discharge came on October 22, 2013.

The parties arbitrated Mr. Williams discharge, and a neutral arbitrator ordered Mr. Williams back to work without backpay on September 22, 2014, after Mr. Williams agreed not to engage in the behavior again. The arbitrator determined that while Mr. Williams engaged in misconduct, it did not justify termination.

SUMMARY OF ARGUMENT

The Board correctly found that the Respondent's decision to terminate Mr. Williams was unlawful. This decision does not create any real or potential conflict with other employment laws.

In its earlier decision, the Board correctly found that Mr. Williams' conduct was not "so egregious" as to lose protection of the Act. In reaching this conclusion, the Board correctly analyzed Mr. Williams' conduct under both *Atlantic Steel* and the totality-of-the-circumstances test. With both, the Board considered that Mr. Williams' writing was impulsive, isolated, and did not disrupt work, while being done in clear protest of the Respondent's unilateral change to

the overtime policy. Furthermore, the Board found that the Respondent had tolerated this very same language from other employees and supervisors, without disciplining any of them.

Courts interpreting Federal employment laws, including Title VII of the Civil Rights Act of 1964,[1] consider the totality of the circumstances in order to determine whether alleged conduct is sufficiently "severe or pervasive" to create a viable claim of sexual harassment. In this analysis, the Supreme Court has consistently found that single, isolated incidents are not sufficiently severe or pervasive to violate those statutes unless they are extremely serious. And, even when the behavior is severe and pervasive, an employer would only be liable for coworker harassment if it fails to meet a negligence standard. Under this standard, the employer would only be liable if it knew of the harassment and failed to take any appropriate remedial action.

The Board's decision in *Constellium* does not create any conflict with the framework of Title VII. Rather, the Board's finding that Mr. Williams' writing was not "so egregious" to lose protection of the Act is consistent with the Supreme Court's requirement that viable claims of sexual harassment must be "so severe and pervasive" as to alter terms and conditions of employment. Furthermore, even though the Board found that the Respondent could not lawfully terminate Mr. Williams, nothing in the Board's Order prevented the Respondent from taking any other prompt remedial action. Thus, even if the Respondent wanted to take corrective action to avoid any potential liability, it was still fully entitled to do so.

Accordingly, since there is no conflict with other employment laws, the Board's decision in *Constellium* should be affirmed.

[1] 42 U.S.C. § 2000e.

ARGUMENT

I. The Board Properly Applied the *Atlantic Steel* Test and Found that Mr. Williams Did Not Lose Protection of the Act.

The appropriate standard for evaluating whether Mr. William's activity lost protection of the Act was articulated by the Board in *Atlantic Steel*.[2] There, the Board established a four-factor balancing test, effectively examining the totality of the circumstances, to determine whether an employee's conduct was so egregious as to lose protection of the Act. More particularly, the Board considered: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the outburst; and (4) whether the outburst was provoked by an employer's unfair labor practice. *Id*. at 816.

Importantly, the Board's analysis does not require all conduct to be tolerated. In fact, in *Atlantic Steel* itself, the Board found that an employee had exceeded the bounds of permissible behavior while engaged in otherwise protected activity. That employee had questioned their supervisor during working time, on the production floor, and "reacted in an obscene fashion without provocation and in a work setting where such conduct was not normally tolerated." *Id*. at 816-17. The entire purpose of the Board's analysis under Atlantic Steel is to balance workers' rights to engage in protected action with their employers' interest in maintaining workplace order. *See Plaza Auto Center, Inc*., 355 NLRB 493, 494 (2010), *enfd. in part* 664 F.3d 286 (9th Cir. 2011), *decision on remand* 360 NLRB No. 117 (2014) (finding that "the Act allows some latitude for impulsive conduct by employees in the course of protected concerted activity, but, at the same time, recognizes that employers have a legitimate need to maintain order.").

[2] 245 NLRB 814 (1979).

Here, the Board evaluated the four factors and found that Mr. Williams' conduct was not so egregious as to lose protection of the Act. *Constellium*, 366 NLRB at 4. The Board began by finding that the location factor was "neutral or lean[ed] marginally in favor of loss of protection." *Id*. The Board considered that the sign-up sheets were in a highly trafficked work area, but also noted that Mr. Williams did not write his comment until the end of the shift before the sign-up sheets were scheduled to be removed. *Id*. The subject matter of the outburst, on the other hand, strongly favored protection because the Board found that Mr. Williams was clearly protesting the Respondent's change to the overtime policy. *Id*. Since the Respondent's unilateral change to the overtime policy "did precipitate a labor dispute," but Mr. Williams' "graffiti" was "not an immediate reaction to an unfair labor practice," the Board noted that this factor was neutral in the analysis. *Id*.

Importantly, the Board found that the third prong[3] – the nature of the outburst – weighed in favor of continued protection under the Act. 366 NLRB at 4. The Board noted that this action was a "one-time incident" and was "likely spontaneous." *Id*. Furthermore, while the contents of the message were "arguably vulgar, it reflected [Mr. Williams'] and his coworkers' strong feelings about the ongoing dispute related to the overtime policy." *Id*. Lastly, the Board rejected the Respondent's argument that Mr. Williams' behavior was "particularly egregious," noting that the Respondent had failed to discipline any other employee for referring to the signup sheet as "the whore board" and generally tolerated profanity in the workplace. *Id*.

[3] The Board has recently asked for briefing on the question of whether there "[a]re circumstances under which the 'nature of the outburst' factor should be dispositive as to the loss of protection, regardless of the remaining *Atlantic Steel* factors." *See General Motors LLC*, 368 NLRB No. 68, Slip Op. at 2 (Sept. 5, 2019).

As described more below, the Board's analysis here is entirely consistent with the approach taken by courts in Title VII cases. In the same way the Board evaluates all of the circumstances to determine whether an outburst is so egregious as to lose protection of the Act, courts likewise consider the totality of the circumstances to determine whether claims of sexual harassment are sufficiently severe to be actionable under Title VII. *See, e.g., Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998) ("[The plaintiff] must 'subjectively perceive' the harassment as sufficiently severe and pervasive to alter the terms or conditions or employment, … [and] 'the objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff's position, considering all the circumstances.'"). And, just as the Board makes allowances for some impulsive comments that contain vulgarity, so too do courts recognize that employment statues like Title VII are not a "general civility code." *See, e.g., Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998) ("*Faragher*") (finding that "'simple teasing,' offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the 'terms and conditions of employment.'").

The Board's conclusion that Mr. Williams' outburst was not so egregious as to lose protection of the Act under Atlantic Steel was sound.

II. Even Under the "Totality of the Circumstances" Test, Mr. Williams' Activity Did Not Lose Protected of the Act.

More still, the Board found that Mr. Williams was not "so egregious" to lose protection of the Act even when the Board applied the "totality of the circumstances" test advocated for by the Respondent. *Constellium*, 366 NLRB at 5.

If an employee is disciplined for misconduct that is part of the *res gestae* of protected activity, that discipline will be found to be unlawful unless, under the totality of the circumstances, the misconduct is determined to be so egregious as to lose protection of the Act. *Constellium*, 366 NLRB at 5 (*citing Consumers Power Co*., 282 NLRB 130, 132 (1986)). In *Consumers Powers*, the Board recognized that the "protections Section 7 affords would be meaningless were we not to take into account the realities of industrial life and the fact that disputes over wages, hours, and working conditions are among the disputes most likely to engender ill feelings and strong responses." 282 NLRB at 132 (*citing Bettcher Mfg. Corp*., 76 NLRB 526, 527 (1948); *Ben Pekin Corp*., 181 NLRB 1025 (1970), *enfd*. 452 F.2d 205 (7th Cir. 1971)).

Applying that test here leads to the same result as with the *Atlantic Steel* analysis. The Board began by finding that Mr. Williams' conduct in writing "whore board" on the overtime signup sheet was part of the *res gestae* of his protected complaints about the Respondent's changes to the overtime policy. *Constellium*, 366 NLRB at 5. Having established that, the Board then reiterated that: "[Mr. Williams'] conduct was a single, brief act that appear[ed] to be impulsive rather than deliberate; there [was] no evidence his conduct interrupted production; and the Respondent had generally tolerated profanity in the workplace and had not disciplined others for using the identical expression." *Id*. Given these circumstances, then, the Board again found that Mr. Williams' behavior simply did not rise to the level of egregiousness necessary to lose protection of the Act.

There is no reason to disrupt the Board's original decision in this matter, or its conclusion that Mr. Williams did not lose protection of the Act.[4] Regardless of the lens used to view Mr. Williams' comments, the Board properly found that it was not sufficiently egregious to justify the Respondent's decision to discharge him.

III. There is No Conflict Between the Board's Decision and Other Employment Laws.

The Board's finding that Mr. Williams' behavior was not so egregious to lose protection of the Act does not create any conflict with other employment laws, including those prohibiting sexual harassment in the workplace. Of course, Title VII prohibits conduct that "discriminates against any individual with respect to his compensation, terms, conditions, or privileges of employment." 42 USC § 2000e-2(a)(1). In this case, however, Mr. Williams isolated conduct did not expose the Respondent to liability for a viable hostile work environment because it was not so "severe or pervasive" as to alter terms and conditions of employment. To the extent that the Respondent wanted to ensure that it nonetheless took prompt remedial action, nothing under Title VII required the Respondent to terminate Mr. Williams. Likewise, there is nothing in the Board's decision prohibiting the Respondent from taking other remedial action short of discipline or discharge. Simply put, there is no conceivable reason why the Respondent could not simultaneously balance its obligations under the Act with the demands of Title VII.

[4] While the dissent in the original case argued for greater weight to be given to the Respondent's property rights, that is outside the limited scope of remand from the Circuit Court here. *See Constellium Rolled Products Ravenswood, LLC v. NLRB*, 945 F.3d 546, 550 (D.C. Cir. 2019) ("Thus, the Board did not depart from its own precedent without explanation and, by considering the defacement of company property within the *Atlantic Steel* loss-of-protection framework, did not create any new, unequivocal rights of employees to deface company property.").

A. Mr. Williams' Conduct Would Not Give Rise to a Viable Claim of Harassment Under Title VII.

The Supreme Court has consistently held that, in order to give rise to a viable claim under Title VII, sexual harassment must be "so severe or pervasive" as to "alter the conditions of [the victim's] employment and create an abusive working environment." *Faragher*, 524 U.S. at 786 *(quoting Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986); *see also Burlington Indus. Inc. v. Ellerth*, 524 U.S. 742, 752 (1998) (finding that conduct must be "severe or pervasive" in order to create a "constructive alteration[n] in the terms or conditions of employment."); *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998) (finding that Title VII "forbids only behavior so objectively offensives as to alter the 'conditions' of the victim's employment."). This determination is not made without context. Instead, courts make such an evaluation as to the severity of the conduct by "looking at all the circumstances," including the "frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Faragher*, 524 U.S. at 787-88, *quoting Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993).

As the Supreme Court has made clear, there is a high bar to establishing a hostile work environment claim. *Faragher*, 524 U.S. at 788. This is "to ensure that Title VII does not become a 'general civility' code." *Id., quoting Oncale*, 523 U.S. at 80. With this in mind, a "recurring point" in the Supreme Court's decisions is that "'simple teasing,' offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the 'terms and conditions of employment'" necessary to establish a viable claim of hostile work environment. *Id., quoting Oncale,* 523 U.S. at 82. This standard will "filter out complaints attacking 'the ordinary tribulations of the workplace, such as the sporadic use of abusive

language.'" *Id.*, *quoting* B. Lindemann & D. Kadue, SEXUAL HARASSMENT IN EMPLOYMENT LAW 175 (1992); *see also Duncan v. Gen. Motors Corp.*, 300 F. 3d 928, 934 (8th Cir. 2002) (stating that to satisfy the "high threshold of actionable harm," a plaintiff must show the workplace was "permeated with discriminatory intimidation, ridicule, and insult").

Here, Mr. Williams' isolated comment, not directed at any individual, would not meet that high bar. Though it may have been crude language used to describe his opposition to the Respondent's conduct, courts have consistently found that single incidents, involving nonphysical contact, would not be sufficiently "severe" under Title VII. *See, e.g., Clark County Sch. Dist. v. Breeden*, 532 U.S. 268, 271 (2001) ("no reasonable person could have believed" that a "single incident" of crude comments would constitute actionable harassment); *Brooks v. City of San Mateo*, 229 F.3d 917, 926 (9th Cir. 2000) ("If a single incident can ever suffice to support a hostile work environment claim the incident must be extremely severe.").

In fact, not one of the cases cited by the Respondent[5] involved an employer being held liable for a single, isolated comment from a coworker, and each are readily distinguishable from the facts here. *Reeves v. C.H. Robinson Worldwide, Inc*., 594 F.3d 798, 804 (11th Cir. 2010) (finding that the plaintiff's claim could survive summary judgment because the offensive sexual epithets directed at her occurred "on a daily basis."); *Forrest v. Brinker Int'l Payroll Co*., 511 F.3d 225 (1st Cir. 2007) (affirming the trial court's granting of the employer's summary judgment motion because the employer had taken prompt remedial action); *Winsor v. Hinckley Dodge, Inc*., 79 F.3d 996 (10th Cir. 1996) (plaintiff was regularly and consistently called degrading epithets, received crude pictures on her desk, and was physically mistreated in the

[5] In this matter, the Respondent submitted a brief in support of its petition for review to the United States Court of Appeals for the District of Columbia. This document is cited herein as "Resp. Br." followed by a page number.

course of her harassment); *Huffman v. City of Prairie Village*, 980 F. Supp. 1192, 1201-02 (D. Kan. 1997) (finding that the plaintiff's claim could survive summary judgment because it "[t]he conduct as related by the plaintiff involved more than isolated instances of sexual comments and offensive utterances."). Mr. Williams' conduct here is far different from any involved in those cases.

Mr. Williams protested a change in the Respondent's overtime policy by scrawling crude language on the sign-up sheet, which was the very mechanism by which this new policy was implemented. He did so at the end of his shift, immediately before the sign-up sheets were scheduled to be removed for that week. This single, isolated incident was not directed at any individual, but was instead an expression of frustration and anger with the Respondent's labor practices. Simply put, this is precisely the type of isolated conduct that the Supreme Court has consistently found insufficiently severe or pervasive to be actionable under Title VII.

But even if Mr. Williams' comment was "severe or pervasive" – which it was not – the Supreme Court has found a significant distinction between the conduct of supervisors and that of coworkers. *See Vance v. Ball State Univ.*, 570 U.S. 421, 424, 427 (2013) ("If the harassing employee is the victim's co-worker, the employer is liable only if it was negligent in controlling working conditions."). As a result, the Respondent would still only be liable for Mr. Williams' conduct if it failed to meet the negligence standard. *Id.*; *see also* Sec. III(B) below. Accordingly, the Respondent's attempts to argue that it was necessary to discharge Mr. Williams in order to meet its obligations under Title VI would still be unavailing and presents the Board with a false choice. There is nothing under Title VII that would require the Respondent to discharge Mr. Williams rather than take some other remedial action, and the Board's decision in *Constellium* is entirely consistent with this principle.

B. The Respondent's Previous Liability for Harassment, Which Included Supervisory Participation, Should Not Impact Mr. Williams.

Divorced from any sense of context, the Respondent frequently cites to a previous, $1 million jury verdict because two female employees were "subjected to [an] unwelcome, gender based, hostile or abusive employment environment" as a basis for its decision to discharge Mr. Williams.[6] That case, and the case here, are easily distinguishable.

In essence, the Respondent argues that it was compelled to terminate Mr. Williams because the Respondent had previously been found liable for a $1 million jury award for sexual harassment and then adopted a "zero tolerance" policy. Resp. Br. at 6. In that case, the Respondent's CEO had posted and replied to comments received from employees referring to two women as "bitches" on an employee bulletin board and company intranet. (Er. Exhs. 9 and 10). While the Respondent maintains that it was held liable because it had "allowed" someone to post these offensive materials,[7] it neglects to mention that the person responsible for posting the comments was the Respondent's CEO. In fact, the West Virginia Supreme Court of Appeals found sufficient evidence to support the jury finding that the victims were subject to harassment because "the jury may have inferred that [the CEO's] publication of the offensive comments and his silent endorsement of gender-specific pejorative language encouraged an abusive environment based on gender." *Constellium Rolled Prod. Ravenswood, LLC v. Griffith*, 775 S.E.2d 90, 98 (W. Va. 2015). The justices concurring in part went further, stating the "the CEO's

[6] *See, e.g.*, Resp. Br. at 18 ("Naturally, Constellium took strong action in response to the adverse jury verdict, including when it learned that Mr. Williams had posted 'Whore Board' on the overtime sign-up sheets only months after the verdict.").

[7] *See* Resp. Br. at 34 ("It is undisputed that a $1 million jury verdict was rendered against Contellium in December 2012 in a case where the jury found that two female employees were subjected to a 'hostile or abusive employment environment' because Constellium had 'allowed' someone to post these offensive materials.").

intentional publication of the comment cards with identifiable and derogatory information regarding [the victims], along with the posted responses that failed to repudiate the disparaging and sexist nature of the comments, illustrates reprehensible conduct." *Id*. at 101.

Federal employment laws acknowledge the power dynamics of the workplace and readily distinguish between coworker conduct and actions performed or condoned by supervisors. *See, e.g., Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 763 (1998) ("[A] supervisor's power and authority invests his or her harassing conduct with a particular threatening character[.]"). If the harassing actor is a coworker, then an employer would be liable under Title VII only if: (a) the harassment was sufficiently severe or pervasive; and (b) the employer knew or should have known about the harassment and failed to take prompt remedial action. *Faragher*, 524 U.S. at 799*; see also Vance v. Ball State Univ*., 570 U.S. 421, 424, 427. On the other hand, an employer will be vicariously liable for harassment from a supervisor. *Burlington*, 524 U.S. at 762-63; *Faragher*, 524 U.S. at 808.

The Respondent's faulty and misleading comparison of Mr. Williams' conduct and that of its supervisors (and, indeed, its Chief Executive Officer in the matter litigated in the West Virginia courts) fails to take this distinction into consideration. Under Title VII, the Respondent would not ever be liable for Mr. Williams' conduct, standing on its own. His single outburst simply did not meet the "severe or pervasive" bar. But even if Mr. Williams' outburst is viewed together with conduct by other coworkers the Respondent would be liable only if it failed to meet a negligence standard – that is, if it failed to take prompt remedial action. As described below, prompt remedial action *does not* require termination, and nothing in the Board's decision precludes such appropriate action. Meanwhile, the Respondent generally would be vicariously

liable under Title VII for harassment that includes a supervisor, such as a CEO, absent some affirmative defense.

Board law is wholly consistent with demands of Title VII in this regard. Since supervisors are specifically excluded from the protections of the Act,[8] the Board will only ever evaluate situations where, like here, the comments are made by an employee-coworker or subordinate. In such circumstances, an employer satisfies its obligations under Title VII (if the work environment is sufficiently permeated with abusive conduct to create liability for the employer in the first place) by showing that it took appropriate corrective action. This remedial action does not need to include discipline that would violate the Act.

The Respondent ran afoul of the Act here because it decided to terminate Mr. Williams for his otherwise protected activity, rather than taking some other remedial action to mitigate the Respondent's liability under Title VII, if any action were even necessary. And, even when applying the *Atlantic Steel* factors, the Board still considered the nature of Mr. Williams' writing. In doing so, the Board correctly noted that this factor still weighed in favor of finding that Mr. Williams' behavior was not so egregious. 366 NLRB at 3-4.

The Board's analysis is wholly consistent with the Supreme Court's framework for analyzing allegations of harassment, which must be so "severe and pervasive" as to alter the terms and conditions of employment in order to be viable. *See Faragher*, 524 U.S. at 788. Both standards look to the severity of the language used, the duration and frequency, and whether it interferes with employees' working conditions. And, under either analysis, Mr. Williams' conduct would not meet the threshold for severity. If Mr. Williams had engaged in behavior that

[8] 29 CFR 152(3) (excluding "any individual employed as a supervisor").

was so egregious as to lose protection of the Act, the Respondent would have been entitled to discipline him accordingly. But, even though Mr. Williams' conduct remained protected under the Act here, the Respondent was still entitled to take other prompt remedial action, including removal of the writing or condemnation of the statement. Again, this is entirety consistent with the requirements of Title VII.

Further undermining the Respondent's argument regarding its "zero tolerance" policy here is the fact that no other employees or supervisors had been disciplined for verbally referring to the sign-up sheets as the "whore board." *Constellium*, 366 NLRB at 2. The Board found that credible testimony elicited at hearing suggested that many employees, and some supervisors, colloquially called the overtime sign-up sheets "the whore board." *Id*. ("the record evidence indicates that 'whore board' became a common expression, frequently uttered even by supervisors."). In fact, one employee testified that he used that phrase in a discussion with human resources. (Tra. at 77). Still, no one else was disciplined for this language.

Accordingly, the fact that the Respondent previously faced liability for other harassment committed by its Chief Executive Officer should not have any bearing on Mr. Williams. An employer should not be entitled to rely upon its supervisors' misconduct to justify infringing employees' right to engage in concerted activity. Instead, the Board's decision in *Constellium* should be affirmed.

C. Nothing in the Board's Order Would Prevent the Respondent from Taking Prompt Remedial Action.

Finally, the Respondent argues that it would somehow be required to "permit the defaced 'Whore Board' overtime sign-up sheets to remain posted." *See* Resp. Br. at 37. The Respondent insinuates that the Board would somehow prevent the Respondent from taking any remedial action. That is simply not true.

To be sure, an employer would face liability under Title VII if it knew – or should have known – about harassing conduct from a coworker and failed to take prompt remedial action. *Faragher*, 524 U.S. at 799; *see also* 29 CFR § 1604.11(d).

Prompt remedial action does not need to trample on employees' Section 7 rights, however. In fact, courts have recognized that corrective action under Title VII "does not require an employer to fire a harasser." *Bailey v. Runyon*, 167 F.3d 466, 467-68 (8th Cir. 1999). Instead, courts will evaluate whether an employer responded appropriately by considering "whether the employer unduly delayed, and whether the response was proportional to the seriousness and frequency of the harassment." *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 675 (10th Cir. 1998). In fact, condemnation of the misconduct may be one form of appropriately responding. 29 CFR § 1604.11(f) ("An employer should take all steps necessary to prevent sexual harassment from occurring, such as affirmatively raising the subject, expressing strong disapproval, . . . informing employees of their right to raise and how to raise the issue of harassment under title VII, and developing methods to sensitize all concerned.").

The Board did not preclude other forms of remedial action. Rather, since the Respondent's decision to discharge Mr. Williams was unlawful under the Act, the Board simply ordered the Respondent to cease and desist from "suspending, discharging, or otherwise

discriminating" employees, including Mr. Williams. *See Constellium*, 366 NLRB at 6-9. Additionally, the Board required the Respondent to affirmatively make Mr. Williams whole for the unlawful discipline. *Id*. The Respondent could have removed the posting (which was scheduled to come down the very next day, in any event), strongly condemned the language, or implemented any number of other responses. It simply could not unlawfully discipline Mr. Williams. That single limitation does not create a conflict with Title VII or other employment laws.

The Board's decision in *Constellium* left the Respondent with ample leeway to respond to "offensive workplace postings" with appropriate, prompt, remedial action. The Board merely ordered that such action not include discriminating against employees engaged in protected activity.

The Respondent now asks for the Board to go further and permit the Respondent to maintain and enforce the very type of "general civility code" that the Supreme Court has repeatedly warned against. *See, e.g., Faragher*, 524 U.S. at 788 (*quoting Oncale*, 523 U.S. at 80). Effectively, the Respondent is seeking a framework under which employers would always be privileged to terminate employees who make any supposedly harassing comments while engaged in protected activity. This type of inflexible rule would pose substantial practical difficulties and ultimately create a civility code for the workplace.

That is not an abstract concern here. As described above, Mr. Williams' behavior would not give rise to a viable claim for sexual harassment under Title VII. Nonetheless, the Respondent maintains that it terminated him because it believed his writing was harassing.

If the Respondent's position here is accepted, then employers would be free to retaliate against employees engaged in protected activity whenever that activity included any remarks that

the employer believed to be harassing or vulgar. This may be true even in cases like here, where the employer misconstrues the employment statute and the action would not actually create a viable claim of harassment. Presumably, this would also extend to supposed harassment based on religion, national origin,[9] age,[10] or real or perceived disability.[11] Would an employee now lose protection of the Act by saying "f**k you" because it could be construed as sexually harassing? Or by suggesting that somebody is "crazy" or a "moron" because it could be harassment on the basis of perceived disability? Or by saying that management is "old and out of touch" because it could be construed as harassing other employees on the basis of age. The Board and reviewing courts would find it quite difficult to draw clear lines between such statements and those in this case. In short, the net effect of such a ruling would be to undermine the Act by reading Title VII and related statutes as requiring precisely the "civility code" that the Supreme Court has consistently found to be inappropriate under those statutes.

[9] *See* Title VII, 42 U.S.C. § 2000e-2.

[10] *See* Age Discrimination in Employment Act, 29 U.S.C. § 623.

[11] *See* Americans with Disability Act, 42 U.S.C. § 12112.

CONCLUSION

The Board's finding that the Respondent violated Section 8(a)(1) and (3) of the Act by disciplining Mr. Williams for his protected activity was sound and does not create any conflict with other employment laws. Accordingly, the Charging Party respectfully requests that the Board affirm its decision and order in *Constellium Rolled Products Ravenswood, LLC*, 366 NLRB No. 131 (2018).

Dated: April 28, 2020

Respectfully submitted,

/s/

Nathan Kilbert
Zachary Hebert

60 Boulevard of the Allies, Suite 807
Pittsburgh, Pennsylvania 15222

CERTIFICATE OF SERVICE

I certify that on April 28, 2020, the foregoing Position Statement was served on all parties or their counsel of record by electronic mail in compliance with Section 102.114(i) of the Board's Rules and Regulations.

Daniel P. Bordoni, Esq.
Morgan Lewis & Bockius LLP
300 South Grand Avenue, 22nd Floor
Los Angeles, CA 90071-3132
daniel.bordoni@morganlewis.com

Patricia K. Nachand
Acting Regional Director, Region 9
National Labor Relations Board
550 Main Street, Room 30003
Cincinnati, OH 45202-371
Patricia.Nachand@nlrb.gov

David R. Broderdorf, Esq.
Morgan Lewis & Bockius LLP
1111 Pennsylvania Avenue NW
Washington, DC 20004-2541
david.broderdorf@morganlewis.com

Respectfully submitted,

/s/ Zachary Hebert

Zachary Hebert
60 Boulevard of the Allies
Pittsburgh, Pennsylvania 15222
zhebert@usw.org